

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

SECURITIES INVESTOR PROTECTION
CORPORATION,

Plaintiff,

v.

BERNARD L. MADOFF INVESTMENT
SECURITIES LLC,

Defendant.

No. 08-01789 (SMB)

SIPA Liquidation

(Substantively Consolidated)

In re:

BERNARD L. MADOFF,

Debtor.

IRVING H. PICARD, Trustee for the Liquidation of
Bernard L. Madoff Investment Securities LLC,
Plaintiff,

v.

LEGACY CAPITAL LTD.,

Defendant.

Adv. Pro. No. 10-05286 (SMB)

**LEGACY CAPITAL LTD.'S DESIGNATION OF ADDITIONAL ITEMS
TO BE INCLUDED IN RECORD AND COUNTER-STATEMENT OF
ISSUES TO BE PRESENTED ON APPEAL**

Pursuant to Rule 8009 of the Federal Rules of Bankruptcy Procedure, Appellee-Cross-Appellant Legacy Capital Ltd. ("Legacy"), by and through its undersigned counsel, respectfully submits the following designation of additional items to be included in the record on appeal and counter-statement of the issues to be presented on appeal and cross-appeal (the "Counter-Statement") in response to the Trustee's Designation of Items to be Included in the Record on Appeal and Statement of Issues to be Presented, dated December 6, 2019 [Adv. Pro. Dkt. No. 238], submitted by Irving H. Picard (the "Trustee"), as trustee of the substantively consolidated

estate of Bernard L. Madoff Investment Securities LLC under the Securities Investor Protection Act (“SIPA”), 15 U.S.C. §§ 78aaa, et seq., and Bernard L. Madoff, individually.¹

I. DESIGNATION OF ADDITIONAL ITEMS TO BE INCLUDED IN THE RECORD ON APPEAL

Legacy designates for inclusion in the record on appeal the additional items listed below from the docket in *Picard v. Legacy Capital Ltd.*, Adv. Pro. No. 10-05286:

<u>Proceeding No.</u>	<u>Filing Date</u>	<u>Doc No.</u>	<u>Docket Text</u>
10-05286 (Bankr. S.D.N.Y.)	09/07/2016	141	Statement / <i>Notice of Motion for Judgment on the Pleadings</i> filed by Oren Warshavsky on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, and Bernard L. Madoff. with hearing to be held on 10/26/2016 at 10:00 AM at Courtroom 723 (SMB) (Attachments: # 1 Proposed Order) (Warshavsky, Oren) (Entered: 09/07/2016)
10-05286 (Bankr. S.D.N.Y.)	09/07/2016	142	Motion to Approve / <i>Memorandum of Law in Support of Trustee's Motion for Judgment on the Pleadings</i> (related document(s)141) filed by Oren Warshavsky on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, and Bernard L. Madoff. (Warshavsky, Oren) (Entered: 09/07/2016)

¹ The Trustee’s Notice of Appeal was filed on November 22, 2019 [Adv. Pro. Dkt. No. 232], and Legacy’s Notice of Cross-Appeal was filed on November 26, 2019 [Adv. Pro. Dkt. No. 234]. Thereafter, the parties submitted a Certification concerning direct appeal to the Court of Appeals [Adv. Pro. Dkt. 235].

<u>Proceeding No.</u>	<u>Filing Date</u>	<u>Doc No.</u>	<u>Docket Text</u>
10-05286 (Bankr. S.D.N.Y.)	09/07/2016	143	Motion to Approve <i>/Declaration of Oren J. Warshavsky in Support of Trustee's Motion for Judgment on the Pleadings</i> (related document(s)141, 142) filed by Oren Warshavsky on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, and Bernard L. Madoff. (Attachments: # 1 Exhibit Madoff Allocation # 2 Exhibit DiPascali Plea Allocation # 3 Exhibit Kugel Plea Allocation) (Warshavsky, Oren) (Entered: 09/07/2016)
10-05286 (Bankr. S.D.N.Y.)	10/07/2016	147	Opposition Brief <i>Memorandum Of Law In Opposition To Trustee's Motion For Judgment On The Pleadings</i> (related document(s)143, 142) filed by Nicholas F. Kajon on behalf of Legacy Capital Ltd.. with hearing to be held on 11/3/2016 at 10:30 AM at Courtroom 723 (SMB) (Attachments: # 1 Exhibit A - Amici Brief) (Kajon, Nicholas) (Entered: 10/07/2016)
10-05286 (Bankr. S.D.N.Y.)	10/25/2016	149	Reply to Motion <i>/Reply Memorandum of Law in Support of Trustee's Motion for Judgment on the Pleadings</i> (related document(s)143, 142) filed by Oren Warshavsky on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, and Bernard L. Madoff. (Warshavsky, Oren) (Entered: 10/25/2016)

<u>Proceeding No.</u>	<u>Filing Date</u>	<u>Doc No.</u>	<u>Docket Text</u>
10-05286 (Bankr. S.D.N.Y.)	12/09/2016	154	Transcript regarding Hearing Held on 11/03/16 at 10:44 AM RE: Motion for Judgment on the Pleadings. Remote electronic access to the transcript is restricted until 3/9/2017. The transcript may be viewed at the Bankruptcy Court Clerks Office. [Transcription Service Agency: Veritext Legal Solutions.]. (See the Courts Website for contact information for the Transcription Service Agency.). Notice of Intent to Request Redaction Deadline Due By 12/16/2016. Statement of Redaction Request Due By 12/30/2016. Redacted Transcript Submission Due By 1/9/2017. Transcript access will be restricted through 3/9/2017. (Cales, Humberto) (Entered: 12/20/2016)
10-05286 (Bankr. S.D.N.Y.)	06/20/2017	162	Letter to Judge Bernstein regarding Pre-Motion Conference dated June 20, 2017 Filed by Oren Warshavsky on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, and Bernard L. Madoff. (Warshavsky, Oren) (Entered: 06/20/2017)
10-05286 (Bankr. S.D.N.Y.)	08/17/2017	164	Letter Letter to Honorable Stuart M. Bernstein Filed by Nicholas F. Kajon on behalf of Legacy Capital Ltd.. Attachments: # 1 Exhibit A - Transcript of 6/28/17 Hearing # 2 Exhibit B - Chain of Three Emails 7- 17-17, 7-18-17 & 8-14-17)(Kajon, Nicholas) (Entered: 08/17/2017)
10-05286 (Bankr. S.D.N.Y.)	08/22/2017	165	Letter to Honorable Stuart M. Bernstein Filed by Nicholas F. Kajon on behalf of Legacy Capital Ltd.. (Kajon, Nicholas) (Entered: 08/22/2017)

<u>Proceeding No.</u>	<u>Filing Date</u>	<u>Doc No.</u>	<u>Docket Text</u>
10-05286 (Bankr. S.D.N.Y.)	12/27/2017	166	Transcript regarding Hearing Held on 6/28/2017 10:08 AM RE: Summary Judgment Conference. Remote electronic access to the transcript is restricted until 3/27/2018. The transcript may be viewed at the Bankruptcy Court Clerks Office. [Transcription Service Agency: Veritext Legal Solutions.]. (See the Courts Website for contact information for the Transcription Service Agency.). Notice of Intent to Request Redaction Deadline Due By 1/3/2018. Statement of Redaction Request Due By 1/17/2018. Redacted Transcript Submission Due By 1/29/2018. Transcript access will be restricted through 3/27/2018. (Ortiz, Carmen) (Entered: 01/08/2018)
10-05286 (Bankr. S.D.N.Y.)	12/21/2018	190	Motion for Summary Judgment / <i>Notice of Motion of Summary Judgment</i> filed by Oren Warshavsky on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, and Bernard L. Madoff. with hearing to be held on 4/3/2019 at 10:00 AM at Courtroom 723 (SMB) (Warshavsky, Oren) (Entered: 12/21/2018)
10-05286 (Bankr. S.D.N.Y.)	12/21/2018	191	Motion for Summary Judgment / <i>Trustee's Memorandum of Law in Support of Motion for Summary Judgment</i> (related document(s)190) filed by Oren Warshavsky on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, and Bernard L. Madoff. (Warshavsky, Oren) (Entered: 12/21/2018)
10-05286 (Bankr. S.D.N.Y.)	12/21/2018	192	Motion for Summary Judgment / <i>Statement of Material Facts In Support Trustee's Motion for Summary Judgment</i> (related document(s)190, 191) filed by Oren Warshavsky on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, and Bernard L. Madoff. (Warshavsky, Oren) (Entered: 12/21/2018)

<u>Proceeding No.</u>	<u>Filing Date</u>	<u>Doc No.</u>	<u>Docket Text</u>
10-05286 (Bankr. S.D.N.Y.)	12/21/2018	193	Declaration of Oren J. Warshavsky In Support of Plaintiff's Motion for Summary Judgment (related document(s)191, 190, 192) filed by Oren Warshavsky on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, and Bernard L. Madoff. (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 (Part 1 of 3) # 3 Exhibit 2 (Part 2 of 3) # 4 Exhibit 2 (Part 3 of 3) # 5 Exhibit 3 (Part 1 of 2) # 6 Exhibit 3 (Part 2 of 2) # 7 Exhibit 4 # 8 Exhibit 5 (Part 1 of 2) # 9 Exhibit 5 (Part 2 of 2) # 10 Exhibit 6 # 11 Exhibit 7 # 12 Exhibit 8 # 13 Exhibit 9) (Warshavsky, Oren) (Entered: 12/21/2018)

<u>Proceeding No.</u>	<u>Filing Date</u>	<u>Doc No.</u>	<u>Docket Text</u>
10-05286 (Bankr. S.D.N.Y.)	03/01/2019	199	<p>Opposition Memorandum of Law In Opposition To Trustee's Motion for Summary Judgment (related document(s)191, 190, 192) filed by</p> <p>Nicholas F. Kajon on behalf of Legacy Capital Ltd.. (Attachments: # 1 Declaration of Nicholas F. Kajon # 2 Kajon Decl., Exhibit A # 3 Kajon Decl., Exhibit B # 4 Kajon Decl., Exhibit C # 5 Kajon Decl., Exhibit D # 6 Kajon Decl., Exhibit E # 7 Kajon Decl., Exhibit F # 8 Kajon Decl., Exhibit G # 9 Kajon Decl., Exhibit H # 10 Kajon Decl., Exhibit I # 11 Declaration of Rafael Mayer # 12 Mayer Decl., Exhibit 1 # 13 Mayer Decl., Exhibit 2 # 14 Mayer Decl., Exhibit 3 # 15 Mayer Decl., Exhibit 4 # 16 Mayer Decl., Exhibit 5 # 17 Mayer Decl., Exhibit 6 # 18 Mayer Decl., Exhibit 7 # 19 Mayer Decl., Exhibit 8 # 20 Mayer Decl., Exhibit 9 # 21 Mayer Decl., Exhibit 10 # 22 Mayer Decl., Exhibit 11 # 23 Mayer Decl., Exhibit 12 # 24 Mayer Decl., Exhibit 13 # 25 Mayer Decl., Exhibit 14 # 26 Mayer Decl., Exhibit 15 # 27 Mayer Decl., Exhibit 16 # 28 Mayer Decl., Exhibit 17 # 29 Mayer Decl., Exhibit 18 # 30 Mayer Decl., Exhibit 19 # 31 Mayer Decl., Exhibit 20 # 32 Mayer Decl., Exhibit 21 # 33 Mayer Decl., Exhibit 22 # 34 Mayer Decl., Exhibit 23 # 35 Mayer Decl., Exhibit 24 # 36 Mayer Decl., Exhibit 25 # 37 Mayer Decl., Exhibit 26 # 38 Mayer Decl., Exhibit 27 # 39 Mayer Decl., Exhibit 28 # 40 Mayer Decl., Exhibit 29 # 41 Mayer Decl., Exhibit 30 # 42 Mayer Decl., Exhibit 31 # 43 Mayer Decl., Exhibit 32 # 44 Mayer Decl., Exhibit 33 # 45 Mayer Decl., Exhibit 34 # 46 Mayer Decl., Exhibit 35 # 47 Legacy Capital Ltd.'s Response to Trustee's Statement of Material Facts Pursuant to Local Bankruptcy Rule 7056-1) (Kajon, Nicholas) (Entered: 03/01/2019)</p>

<u>Proceeding No.</u>	<u>Filing Date</u>	<u>Doc No.</u>	<u>Docket Text</u>
10-05286 (Bankr. S.D.N.Y.)	03/22/2019	201	Response / <i>Trustee's Reply Memorandum of Law In Further Support of Motion For Summary Judgment</i> filed by Oren Warshavsky on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, and Bernard L. Madoff. (Warshavsky, Oren) (Entered: 03/22/2019)
10-05286 (Bankr. S.D.N.Y.)	03/22/2019	202	Declaration / <i>Reply Declaration of Oren J. Warshavsky In Support of The Trustee's Motion For Summary Judgment</i> (related document(s)201) filed by Oren Warshavsky on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, and Bernard L. Madoff. (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6) (Warshavsky, Oren) (Entered: 03/22/2019)
10-05286 (Bankr. S.D.N.Y.)	03/22/2019	204	Reply to Motion <i>Reply Memorandum of Law of the Securities Investor Protection Corporation in Support of the Trustee's Motion for Summary Judgment</i> (related document(s)191) filed by Nathanael Kelley on behalf of SIPC. (Attachments: # 1 Certificate of Service) (Kelley, Nathanael) (Entered: 03/22/2019)
10-05286 (Bankr. S.D.N.Y.)	03/28/2019	208	<i>Letter to the Honorable Stuart M. Bernstein on Legacy's Motion to Strike Section II.C. of SIPC's Reply Brief</i> (related document(s)204) Filed by Nicholas F. Kajon on behalf of Legacy Capital Ltd.. (Kajon, Nicholas) (Entered: 03/28/2019)

<u>Proceeding No.</u>	<u>Filing Date</u>	<u>Doc No.</u>	<u>Docket Text</u>
10-05286 (Bankr. S.D.N.Y.)	03/29/2019	210	Letter <i>Letter re Legacy Capital Ltd.'s Letter Request</i> (related document(s)208) Filed by Nathanael Kelley on behalf of SIPC. (Attachments: # 1 Certificate of Service)(Kelley, Nathanael) (Entered: 03/29/2019)
10-05286 (Bankr. S.D.N.Y.)	03/29/2019	211	Memorandum Endorsed Order Signed On 3/29/2019 Re: Legacy May Submit A Sur-Reply, Limited To Ten Pages, In Response To SIPC's Discussion Of UCC 8-502. So Ordered., (related document(s)204, 201, 190, 202, 199, 192, 193, 191). (Mercado, Tracey) (Entered: 03/29/2019)
10-05286 (Bankr. S.D.N.Y.)	04/04/2019	212	Response <i>Sur-Reply of Legacy Capital Ltd. In Response To Reply Memorandum of Law Of The Securities Investor Protection Corporation In Support of The Trustee's Motion for Summary Judgment</i> (related document(s)204) filed by Nicholas F. Kajon on behalf of Legacy Capital Ltd.. (Kajon, Nicholas) (Entered: 04/04/2019)
10-05286 (Bankr. S.D.N.Y.)	04/11/2019	218	Transcript regarding Hearing Held on 4/9/19 at 10:29 AM RE: Trustees Motion for Summary Judgment. Remote electronic access to the transcript is restricted until 7/10/2019. The transcript may be viewed at the Bankruptcy Court Clerks Office. [Transcription Service Agency: Veritext Legal Solutions.]. (See the Courts Website for contact information for the Transcription Service Agency.) (RE: related document(s) 191). Notice of Intent to Request Redaction Deadline Due By 4/18/2019. Statement of Redaction Request Due By 5/2/2019. Redacted Transcript Submission Due By 5/13/2019. Transcript access will be restricted through 7/10/2019. (Cales, Humberto) (Entered: 04/25/2019)

<u>Proceeding No.</u>	<u>Filing Date</u>	<u>Doc No.</u>	<u>Docket Text</u>
10-05286 (Bankr. S.D.N.Y.)	04/17/2019	214	Letter <i>in Connection with the Trustee's Pending Motion for Summary Judgment</i> Filed by Oren Warshavsky on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, and Bernard L. Madoff. (Warshavsky, Oren) (Entered: 04/17/2019)
10-05286 (Bankr. S.D.N.Y.)	04/24/2019	216	Letter <i>to the Honorable Stuart M. Bernstein in response to the Trustee's letter dated April 17, 2019</i> Filed by Nicholas F. Kajon on behalf of Legacy Capital Ltd.. (Kajon, Nicholas). (Related document(s) 214) Modified on 4/24/2019 (Richards, Beverly). (Entered: 04/24/2019)
10-05286 (Bankr. S.D.N.Y.)	05/06/2019	219	Letter <i>in Response to Defendant Legacy Capital Ltd.'d April 24, 2019</i> Letter (related document(s)216) Filed by Oren Warshavsky on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, and Bernard L. Madoff. (Warshavsky, Oren) (Entered: 05/06/2019)
10-05286 (Bankr. S.D.N.Y.)	06/25/2019	221	Written Opinion Signed On 6/25/2019. Re: Memorandum Decision And Order Granting Relief Under Federal Civil Rule 56(g) (related document(s)190) (Barrett, Chantel) (Entered: 06/25/2019)
10-05286 (Bankr. S.D.N.Y.)	07/10/2019	222	Order Signed On 7/9/2019 Re: Denying The Trustees Motion For Summary Judgment And Granting Relief Under Federal Rule Of Civil Procedure 56(G) (Related Doc # 190). (Barrett, Chantel) (Entered: 07/10/2019)

II. COUNTER-STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL AND CROSS-APPEAL

A. Whether the Bankruptcy Court erred in ruling that the Trustee had met his burden on summary judgment to demonstrate that Bernard L. Madoff Investment Securities LLC was a Ponzi scheme.

B. Whether the Bankruptcy Court erred in ruling that the Trustee was entitled to rely on the Ponzi scheme presumption in establishing that transfers were made with actual intent to defraud.

C. Whether the Bankruptcy Court erred in entering an order finding certain facts to be established in the case pursuant to Rule 56(g) of the Federal Rules of Civil Procedure.

D. Whether the Bankruptcy Court erred in determining that, with respect to any transfers in excess of the amount of Legacy's invested principal, Legacy did not provide value within the meaning of Section 548(c).

Dated: December 20, 2019
New York, New York

By: /s/ Eric. B. Fisher
BINDER & SCHWARTZ LLP
366 Madison Avenue, Sixth Floor
New York, New York 10006
Telephone: (212) 510-7008
Facsimile: (212) 510-7299
Eric B. Fisher
Email: efisher@binderschwartz.com
Lindsay A. Bush
Email: lbush@binderschwartz.com

*Attorneys for Appellee/Cross-Appellant
Legacy Capital Ltd.*